

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
CIVIL ACTION NO. 04 11539 JLT

WALTER STICKLE, ANTHONY
CALIENDO, JOHN PITINGOLO, and
DANIEL FISHER,
Plaintiffs

V.

ARTHUR ORFANOS,
Defendant

DEFENDANT'S OBJECTION TO AND OPPOSITION TO PLAINTIFFS'

PROPOSED “ORDER” FOR PRELIMINARY INJUNCTION

NOW comes Defendant, Plaintiff in Counterclaims (Defendant), in accordance with all applicable rules, regulations and procedures, as well as the Honorable Judge Tauro's verbal direction on September 29, 2004, to respectfully object to and oppose Plaintiff's proposed "ORDER" for Preliminary Injunction (Order) as follows:

1. Said Order is unjustifiable, excessive, inequitable and otherwise unjust.
2. Said Order cannot be issued because Plaintiffs fail, neglect and refuse to meet the requisite burden of proof in the instant matter because Plaintiffs cannot substantiate their claims, cannot meet the requisite burden of proof, cannot demonstrate a likelihood of success on the merits, and do not stand to be irreparably harmed, no injunctive relief is available. See, e.g., Camel Hair and Cashmere Institute of America, Inc. v. Associated Dry Goods Corporation. 799 F. 2d 6, 12 (1stCir. 1986).
3. Defendant is the true, lawful owner of the intellectual property at issue in the

instant matter, and / or has as great if not a greater claim to same as the Plaintiffs (regardless of Plaintiffs' inability to financially profit from their illegal use thereof). 15 U.S.C. §§ 1125(a), (d). *See Defendant's Affidavit, attached hereto and incorporated herein and all Exhibits 1 – 40 attached thereto.* Pink Voyd is The Mood, Defendant's original creation to pay tribute to Pink Floyd. Defendant founded The Mood in 1982, and began discussing his intellectual property concept with certain of the Defendant's in 1998. *Id.* Defendant trademarked The Mood in 1999, and also registered related domain names. Later, in 2000 – 2001, the band The Mood discussed changing the band name and Defendant consequently registered related domain names. Defendant initially registered www.pinkvoyd.com on or about May 23, 2001. Under duress, he transferred same to Plaintiff. Defendant applied to USPTO to register Pink Voyd in 2002, and also in 2004 to use same; he was informed in 2004 he was the owner of the Pink Voyd mark. *Id.* Defendant's Counterclaims against Plaintiffs reserve and establish his claims for same, but in a forum he wished to and affirmatively acted strongly to avoid. *Id.* Because Defendant is the rightful user of the mark "Pink Voyd", he is not liable under §1125(d).

4. Plaintiffs' Order, if granted, would violate Defendant's rights to due process because, amongst other things, there exists irreparable harm to Defendant through Plaintiff's continued use of Defendant's intellectual property and Defendant has claimed same in his counterclaims against Plaintiffs; The forum for such determinations is a trial, not a Motion Hearing or through injunctive relief. *See, e.g.,* 14th Amendment, US Constitution.

5. Because Plaintiffs have used and continue to use business practices and

entertainment methodologies which are the same as or similar to those created by Defendant and which mislead the public, Plaintiffs must immediately cease and desist from improperly using and otherwise illegally benefiting from Defendant's intellectual property, *See, e.g., Defendant's Exhibit 22*; Plaintiffs must thus forthwith:

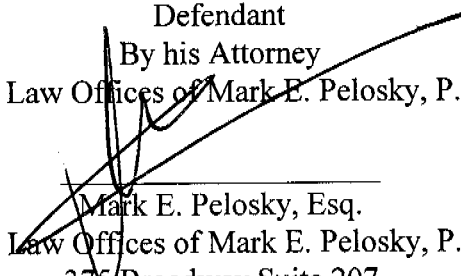
- A. Cease and desist from all and any further use of Pink Voyd name in all capacities (websites, performances, advertisings, other);
- B. Cease and desist from all and any further use of Defendant's intellectual and other properties, materials, concepts of laser lights / multi color light shows / visual effects in the form of, amongst other things, video screening(s) as Pink Floyd displays, placing portions of the white "Brick wall" on stage replicating Pink Floyd's wall, and other;
- C. Cease and desist from all and any further use of photos of the Defendant's sound system, laser light show and slide show advertised on the Pinkvoyd.com site which are the same exact light show and photos created by Defendant and used by Defendant's group "The Mood." *See, e.g., Defendant's Exhibit 19*;
- D. Cease and desist from all and any further use of Defendant's intellectual property in their electronic, telecommunications and other media ("The printout from Pinkvoyd.com, "The Mood" [is] listed in the [Pink Voyd] META TAG", *See, e.g., Defendant's Exhibit 28*;
- E. Cease and desist from all and any further use of Defendant's "same exact sound system specific to [Defendant's] IP (with "The Mood" stenciled on it)", *See Defendant's Affidavit # 82*;;

6. The parties should be Ordered to mediate, arbitrate or otherwise resolve their claims outside of a trial forum; Defendant has requested same in writing on at least two (2) separate occasions, but Plaintiffs' response was to file the instant lawsuit.

In further support hereof, please see Defendant's Answer to Plaintiffs' Complaint and Counterclaims, as well as all documents, Exhibits and other attached thereto and incorporated therein.

WHEREFORE Defendant respectfully requests this Honorable Court consider the aforementioned points, as well as Defendant's oral arguments on September 29, 2004, and Order fair and equitable relief herein.

Respectfully submitted,

Defendant
By his Attorney
The Law Offices of Mark E. Pelosky, P.C.

Mark E. Pelosky, Esq.
The Law Offices of Mark E. Pelosky, P.C.
375 Broadway Suite 207
Chelsea, MA 02150
617 884 8100

October 7, 2004

